

REMARKS

6 Claims 1-39 are pending in the application.

8 Claims 1-39 have been rejected.

10 Claims 2, 5-6, 16, 18-19, 29, and 35 have been cancelled without
11 prejudice, solely to facilitate the prosecution of this application. Claims
12 dependent upon the cancelled claims have been amended so as not to depend from
13 a cancelled claim.

15 Abstract

17 The Abstract was objected to because it was greater than 150 words.

19 A corrected Abstract is submitted herewith. Applicant notes that when
20 this application was filed, the rules allowed an Abstract to be as long as 250
21 words.

23 **Claim Rejections: 35 U.S.C. §103(a)**

25 Claims 1-39 were rejected under 35 U.S.C. §103(a) as being
26 unpatentable over Philips et al. (U.S. Pat. No. 6,792,399) and official notice.

28 As Applicant understands the Examiner's rejections, the rejections
29 of these Claims can be grouped as follows:

35 Claims 2, 16, 26, 29, and 35 were rejected based on the Abstract.

1 Claims 3, 17, 30, and 36 were rejected based upon the Abstract and
2 col. 12, line 54 - col. 13, line 20.

3
4 Claims 4, 31, and 37 were rejected for no stated reason. Applicant
5 assumes these rejections were based on the rejection of the underlying
6 independent claims.

7
8 Claim 5 was rejected based upon Fig. 10, reference numeral 166.

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10 Claims 6 and 19 were rejected based on Figs. 5A through 10.

11 Claims 7, 20, and 21 were rejected based on official notice.

12 Claims 8, 10-11, and 23-24 were rejected based on official notice.

13
14 Claims 9 and 22 were rejected based on the Abstract and col. 12, line
15 54 - col. 13, line 20.

16
17 Claim 18 was rejected for the same reason as Claim 4, and based on
18 Fig. 10, reference numeral 166.

19
20 Applicant's response to these rejections will generally deal with the
21 claims as grouped above, except as noted below for specific claims for which a
22 group answer would not be applicable.

23
24 Applicant respectfully traverses these rejections. To reject a
25 claimed invention based upon its obviousness over the prior art, the examiner
26 must support such a rejection by establishing the invention's prima facie
27 obviousness. The examiner must show where in the art cited there is a
28 description of the claimed invention sufficient to have taught or suggested the
29 invention to ordinarily skilled artisans of the time (see, e.g., ACS Hospital
30 Systems, Inc., v. Montefiore Hospital, 221 U.S.P.Q. 929, 933 (F. Cir. 1984); see
31 also, In re Fine, 5 U.S.P.Q.2d 1596 (F. Cir. 1988)).

32
33 Evaluation of whether the cited documents provide the necessary
34 description requires consideration of "(1) whether the prior art would have

1 suggested to those of ordinary skill in the art they should make the claimed
2 [invention] ... and (2) whether the prior art would have also revealed that in
3 so making ... those of ordinary skill would have a reasonable expectation of
4 success" (*In re Vaeck*, 20 U.S.P.Q.2d 1438, 1442 (F. Cir. 1991)). "Both the
5 suggestion and the reasonable expectation of success must be found in the prior
6 art, not in the applicant's disclosure" (*In re Vaeck*, *supra*). That is, "one
7 cannot use hindsight reconstruction to pick and choose amongst isolated
8 disclosures in the prior art to deprecate the claimed invention" (*In re Fine*,
9 *supra* at 1600).

10
11 Claims 1, 14, 15, 27, 28, 32-34 and 38-39
12

13 Claims 1, 14, 15, 27, 28, 32-34, and 38-39 were rejected based upon
14 col. 1, lines 15-48, col. 12, line 54 - col. 13, line 20, Abstract and cluster
15 analysis, Figs. 8 and 10, and Figs. 5A-5B.

16
17 Phillips *et al.* analyze data in different ways. The cluster analysis
18 referred to is only used after data has been analyzed by various individuals
19 using the service offered by these inventors; cluster analysis is used for what
20 can be considered an analysis of the analysis, to even out the analyzed data
21 based on levels of participation by the various individual forecasters whose
22 analyses are providing data to the system (see col. 43, lines 1-13).

23
24 Figures 5A and B have nothing to do with data analysis per se. While
25 a portion of the Figures represent historical data over a specified time period,
26 no analysis is drawn from such historical data; the user merely decides what a
27 future value may be at a future date by a method which is not at all specified
28 in the reference (col. 25, line 24 - col. 27, line 38, noting the text at col.
29 27, lines 19-20 referring to clicking on an arbitrary area within the figure).

30
31 Thus, to conclude that the Phillips *et al.* reference, in combination
32 with official notice of some unspecified element teaches the present claimed
33 invention, is purely speculation. Without some basis in the reference, and
34 without some evidentiary basis in the record to support official notice as
35 regards an independent claim, the rejection of Claim 1, and the rejection of
36 Claims 14, 15, 27, 28, 32-34, and 38-39 under 35 U.S.C. §103(a) is improper and

1 must respectfully be reversed MPEP §2144.03.

2
3 **Claims 2, 16, 26, 29, and 35**

4
5 Claims 2, 16, 26, 29, and 35 were rejected based on the Abstract.

6
7 Claims 2, 16, 29, and 35 have been cancelled without prejudice
8 because their contents have been incorporated into the respective independent
9 claims. Claims dependent upon these cancelled claims 2, 16, 29, and 35 have been
10 amended so as not to depend from a cancelled claim.

11
12 The rejection of Claim 26 is traversed because there is no teaching
13 in the Abstract about how the data is ordered, and the Examiner has failed to
14 provide documentary evidence for where, if any, official notice is being used to
15 fill gaps in the record. Applicant respectfully submits that because there is
16 no teaching in the Phillips et al. Abstract about how data is ordered, there can
17 be no combination of teachings which would suggest the present claimed invention
18 to one of ordinary skill in the art at the time of the invention. Accordingly,
19 Applicant respectfully submits that Claim 26 defines patentable subject matter,
20 and that its rejection under 35 U.S.C. §103(a) be withdrawn.

21
22 **Claims 3, 17, 30, and 36**

23
24 Claims 3, 17, 30, and 36 were rejected under 35 U.S.C. §103(a) based
25 on the Abstract, and col. 12, line 54 - col. 13, line 20 of Phillips et al.

26
27 The rejection of Claims 3, 17, 30, and 36 is traversed because while
28 the claims refer to ordering the individual data points, there is no teaching in
29 the Abstract about how the data is ordered, and the Examiner has failed to
30 provide documentary evidence for where, if any, official notice is being used to
31 fill gaps in the record. Applicant respectfully submits that because there is
32 no teaching in the Phillips et al. Abstract about how data is ordered, there can
33 be no combination of teachings which would suggest the present claimed invention
34 to one of ordinary skill in the art at the time of the invention. Accordingly,
35 Applicant respectfully submits that Claims 3, 17, 30 and 36 define patentable
36 subject matter, and that their rejection under 35 U.S.C. §103(a) be withdrawn.

1 **Claims 4, 31, and 37**

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3 No reason was stated for the rejection of these claims. Applicant
4 assumes that these rejections were based on the rejection of the underlying
5 independent claims, and having distinguished the independent claims as defining
6 patentable subject matter, Applicant respectfully submits that these dependent
7 claims define patentable subject matter, and accordingly, the rejection of Claims
8 4, 31, and 37 should be withdrawn.

9
10 **Claims 5 and 18**

11
12 Claims 5 and 18 were rejected based upon Fig. 10, reference numeral
13 166.

14
15 Claims 5 and 18 have been cancelled without prejudice solely to
16 facilitate the prosecution of this application.

17
18 **Claims 6 and 19**

19
20 Claims 6 and 19 were rejected based on Figs. 5A through 10.

21
22 Claims 6 and 19 have been cancelled without prejudice solely to
23 facilitate the prosecution of this application.

24
25 **Claims 7, 20, and 21**

26
27 Claims 7, 20, and 21 were rejected based on Phillips et al.'s
28 reference to percent (col. 6, lines 44-49) and official notice.

29
30 Applicant respectfully traverses this rejection because there is no
31 basis to combine the reference with official notice. Phillips et al.'s comment
32 about percent merely refers to "percentile rankings" of individual participants,
33 that is, how well the participants performed in forecasting compared to one
34 another. Percentile rankings has no relationship to a determination of percent
35 change over time.

36

1 The Examiner's allegation that determining percent change is old and
2 well known in the art is without any documentary or evidentiary support, as
3 required by the MPEP in section 2144.03. With the incorrect reliance on
4 Phillips et al., there is thus no support in the record on which the Examiner can
5 rely to take official notice.

6
7 MPEP § 2144.03 B. continues with "there must be some form of evidence
8 in the record to support an assertion of common knowledge", citing In re Lee, 61
9 U.S.P.Q.2d 1430, 1434-1435 (F. Cir. 2002) and In re Zurko, 59 U.S.P.Q.2d, 1693,
10 1697 (F. Cir. 2001). Therefore, because the examiner's general conclusion that
11 what is common knowledge to one of ordinary skill in the art without any specific
12 factual finding and concrete evidence in the record, there is no basis to support
13 the rejections of these claims based upon obviousness. The examiner must provide
14 specific factual findings predicated on sound technical and scientific reasoning
15 to support these conclusions of common knowledge.

16
17 In the rejections in this case, the examiner has taken official
18 notice that is unsupported by any documentary evidence, and has provided no
19 technical line of reasoning to support such a conclusion.

20
21 Even assuming that it was proper to take official notice, such a
22 combination would still not teach the claimed invention because citation to the
23 Phillips et al. reference is incorrect.

24
25 Thus, Applicant respectfully submits that the rejections of Claims
26 7, 20 and 21 were improper, and requests that the rejections of these claims
27 under 35 U.S.C. §103(a) be withdrawn.

28
29 **Claims 8, 10-11, and 23-24**

30
31 Claims 8, 10-11, and 23-24 were rejected based on Phillips et al.'s
32 reference to percent (col. 6, lines 44-49) and official notice.

33
34 Applicant respectfully traverses these rejections because the
35 Phillips et al.'s comment about percent merely refers to "percentile rankings"
36 of individual participants, that is, how well the participants performed in

1 forecasting compared to one another. Percentile rankings has no relationship to
2 a determination of percent change over time.

3

4 The Examiner's allegation that determining percent change is old and
5 well known in the art is without any documentary or evidentiary support, as
6 required by the MPEP. MPEP §2144.03. With the incorrect reliance on Phillips
7 et al., there is thus no support in the record on which the Examiner can rely to
8 take official notice.

9

10 Even assuming that it was proper to take official notice, such a
11 combination would still not teach the claimed invention because citation to the
12 Phillips et al. reference is incorrect.

13

14 Thus, Applicant respectfully submits that the rejections of Claims
15 8, 10-11 and 23-24 were improper, and requests that the rejections of these
16 claims under 35 U.S.C. §103(a) be withdrawn.

17

18 **Claims 9 and 22**

19 Claims 9 and 22 were rejected based on the Abstract and col. 12, line
20 54 - col. 13, line 20.

21

22 The rejection of Claims 9 and 22 is traversed because there is no
23 teaching in the Abstract about how the reference point is determined, nor
24 anything about whether there is a correspondence between the reference data
25 points and chosen individual data points. The textual references similarly lack
26 such information that would lead to a suggestion to combine the teaching of the
27 reference with something else to arrive at Applicant's claimed invention. The
28 Examiner has failed to provide documentary evidence for where, if any, official
29 notice is being used to fill gaps in the record. Applicant respectfully submits
30 that because there is no teaching in the Phillips et al. reference about
31 correspondence between data points and reference points, there can be no
32 combination of teachings which would suggest the present claimed invention to one
33 of ordinary skill in the art at the time of the invention. Accordingly,
34 Applicant respectfully submits that Claims 9 and 22 define patentable subject
35 matter, and that their rejections under 35 U.S.C. §103(a) be withdrawn.

36

1 **Claim 18**

2 Claim 18 was rejected for the same reason as Claim 4, and based on
3 Fig. 10, reference numeral 166.

4
5 Claim 18 has been cancelled without prejudice, solely to facilitate
6 the prosecution of this application, and its language has been incorporated into
7 Claim 17. Applicant respectfully submits that Claim 17 defines patentable
8 subject matter.

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CONCLUSION

Applicant thanks the Examiner for his thoughtful review of this application, and respectfully requests the Examiner review the pending Claims and to find that they define patentable subject matter. Thus, it is respectfully requested that the present pending Claims be allowed.

In the event that this Amendment does not place the application in condition for allowance, the Examiner is respectfully requested to telephone the undersigned in order that an attempt can be made to place the application in condition for allowance as expeditiously as possible.

Respectfully submitted,

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